Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
SBC Petition for Declaratory Ruling That	)	
UniPoint Enhanced Services, Inc. d/b/a	)	WC Docket No. 05-276
PointOne and Other Wholesale Transmission	)	
Providers Are Liable for Access Charges	)	
Petition for Declaratory Ruling That USA	)	
Datanet Corp. Is Liable for Originating	)	
Interstate Access Charges When It Uses	)	
Feature Group A Dialing To Originate Long	)	
Distance Calls	)	

REPLY COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION ON THE FRONTIER PETITION FOR DECLARATORY RULING

As set forth in its Comments, the United States Telecom Association (USTelecom),[1] strongly and unequivocally supports the Frontier Petition.[2] This support is shared widely by the parties that filed comments on the Frontier Petition. In particular, most of the comments agree that the Commission must act quickly on this matter to preserve the legal foundation for commercial exchange and industry respect for Commission rules and orders. In these Reply Comments, USTelecom reiterates its support for the Frontier Petition, and demonstrates the fallacies in some parties' arguments opposing the petition.

[1] USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

[2] United States Telecom Association, Comments on the Frontier Petition for Declatory Ruling, *SBC Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No 05-276 (Jan. 9, 2006).

INTRODUCTION

None of the parties filing comments seriously contests the basic fact that current Commission rules and orders hold that interLATA calls that originate and terminate on the public switched telephone network (PSTN) are "telecommunications services" subject to access charges, whether or not the calls are transported using the Internet Protocol ("IP"), and whether or not they are transported by one carrier or more than one carrier.[3] Instead, USA Datanet and parties supporting its position focus their attention on frivolous procedural arguments and other arguments based on obfuscation and hair-splitting distinctions to argue that USA Datanet is not obligated to pay for the services it has received but, rather, can use them for free. At bottom, USA Datanet is attempting to use Frontier's services without paying lawful charges for those services, contrary to core principles of law and equity that disallow windfalls to those who would keep the benefit of services rendered without paying for those services.[4]

Parties opposing the Frontier Petition focus on the following arguments:

(1) USA Datanet argues that the Petition is a tariff dispute that cannot be resolved in a rulemaking proceeding but, rather, may only be resolved in federal district court consistent with section 207 after the Commission issues its rulings on the IP-Enabled Service NPRM and the VarTec Petition for Declaratory Ruling[5];

[3] *See* 47 C.F.R. § 69.5(b) (providing that access charges shall be assessed on "interexchange carriers"); *id.* § 69.2(s) (defining "interexchange" as ("services or facilities provided as an integral part of interstate or foreign telecommunications"); *AT&T IP-in-the-Middle Order* ¶¶ 12, 19.

[4] *See, e.g.*, USTelecom Comments, at 10_(describing legal and equitable theories and claims that may apply to compensate LECs in circumstances such as those described in the Petition).

[5] USA Datanet Comments, *passim*.

(2) USA Datanet argues, in the alternative and joined by Earthlink,[6] that the substance of the Petition is not properly addressed in a declaratory ruling and that the Commission should only rule on the proceedings identified by the district court, namely "the VoIP intercarrier compensation rulemaking issues as well as the SBC/Vartec proceedings" (at which point, the federal district court will attempt to apply Commission rules to the dispute between Frontier and USA Datanet);

(3) Earthlink also argues that USA Datanet is an intermediate carrier and, as such, it cannot be liable for access charges (which Earthlink asserts can only be assessed on directly interconnected carriers)[7]; and

(4) conversely, PAETEC, while agreeing with Frontier that USA Datanet is using access services, argues that a LEC "is never liable for access charges when it jointly provides originating or terminating switched access service with another LEC."[8]

Each of these arguments is without merit insofar as it seeks to prevent the Commission from clearly articulating that carriers using jointly-provided Feature Group-A originating access services (e.g., USA Datanet in the situation presented by the Frontier Petition) are required under current rules to pay tariffed access charges for those services. Moreover, the Commission can and should take this opportunity to explain quickly that access charges payments are due in situations like the one described in the Frontier Petition.

[6] Earthlink Comments, at 2-4.

[7] *Id*. at 7-9.

[8] PAETEC Comments, at 1-2.

USA DATANET OWES FRONTIER COMPENSATION FOR ITS USE OF ORIGINATING ACCESS SERVICES

The evidence and arguments presented in the Comments, clearly show that USA Datanet is using jointly-provided originating access services, and that it is not exempt from access charges under the Commission's decision on the AT&T Petition concerning "IP-in-the-middle" long distance traffic.[9] Even PAETEC—the LEC from whom USA Datanet purchases connections to the local phone network refers to USA Datanet as the access customer.[10] Nonetheless, USA Datanet has failed to pay its interstate access charge bills for nearly three years, even while it has obeyed an order by the New York Public Service Commission to pay intrastate access charges. In fact, as Frontier explains, USA Datanet is continuing its delaying tactics with frivolous procedural objections.[11] Accordingly, the Commission should promptly reject those objections and explain in this SBC/VarTec docket that carriers using jointly-provided Feature Group-A originating access services are required under current rules to pay tariffed access charges for those services.

THE COMMISSION HAS JURISDICTION TO EXPLAIN THAT THE ENHANCED SERVICE PROVIDER EXEPTION DOES NOT APPLY IN THIS CASE

USA Datanet and Earthlink object to Frontier's request that the Commission explain that tariffed access charges are owed on the use of jointly-provided FG-A originating access services for non-local calls that originate and terminate on the public switched telephone network (PSTN) even when those calls are transported over Internet Protocol (IP) links. USA Datanet argues that this is an inherently fact-specific question (which, of course, it is not), while Earthlink argues that

[9] *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) ("*AT&T IP-in-the-Middle Order*").

[10] PAETEC Comments, at 1.

[11] *See*, Frontier Opposition, *passim*.

this is a policy question that can only be decided in the context of an ongoing rulemaking or the VarTec Petition. Both argue that the district court did not refer any question to the Commission despite the fact that the district court found "it would be prudent to stay the instant case until such time as the FCC resolves the issue whether or not VoIP providers such as Datanet are liable for access charges."[12]

It is hard to imagine a more clear statement of the question the district court would like the Commission to resolve, including the specific application to USA Datanet. Moreover, Frontier is not seeking monetary recovery in a Commission proceeding, as alleged by USA Datanet in arguing that this action is barred by section 207. Rather, Frontier simply is seeking a Commission explanation of the current rules so that the district court may act on Frontier's cause of action. Finally, there can be no doubt that the traffic at issue falls within the scope of the Commission's ruling in the *AT&T IP-in-the-Middle Petition*. As BellSouth explains, that decision was not limited to terminating traffic, nor was it limited to "1+ dialing."[13] Since the district court apparently didn't receive this message, the Commission should act promptly to provide the district court with the guidance it is awaiting;.

To the extent there are procedural requirements for primary jurisdiction referrals that may not have been met here (and USTelecom sees no such problems), such rules cannot reasonably be held to bar the Commission from issuing an order answering the district court's question. The Commission need not award monetary relief; it can simply explain the application of its rules. The fact that related issues may be raised in other open proceedings naturally does not preclude the Commission from issuing a declaratory ruling in response to the Frontier Petition. Nor is the Commission precluded from explaining its rules because Frontier illustrated its request for

[12] *District Court Referral*, at 9-13.

[13] BellSouth Comments, at 2-7.

declaratory ruling with specific facts. Indeed, it would be perverse if the Commission were denied the opportunity to explain its rules for either of these reasons. To the extent there are questions of fact, the Commission (just like a court) may assume the facts pled by Frontier are true and issue its conclusions of law on that basis.

Earthlink's objection is harder to comprehend, and easier to resolve.[14] This docket is, in fact, the very same docket in which the VarTec Petition was filed and is pending, so the Commission would be acting well within the district court's expectations by issuing an answer to the Frontier Petition in this docket. In any event, it cannot be the case that pending litigation between two parties could preclude the Commission from explaining its rules, or even revising them pursuant to a proper notice-and-comment rulemaking proceeding. If it were so, a handful of private parties could use lawsuits and court proceedings to stymie rulemaking that they feared would be against their interests.

COMMISSION RULES AND THE COMMUNICATIONS ACT REQUIRE CARRIERS TO ACT REASONABLY, WHICH MEANS THAT FRONTIER MUST BE COMPENSATED FOR PROVIDING ORIGINATING ACCESS SERVICES

Earthlink's assertion that only directly-connected carriers can be liable for access charges is simply wrong, as shown by the long-standing practice of LECs (and Competitive Access Providers through Expanded Interconnection) jointly providing access services and billing under the multiple provider/multiple bill process. Moreover, the facts of this case demonstrate that USA Datanet clearly understands that it is obtaining access to Frontier's network as well as PAETEC's network for the purpose of providing non-local calling. Therefore, as AT&T explains, the Constructive Ordering Doctrine would apply and USA Datanet would be liable for

[14] Earthlink Comments, at 2-4.

originating access charges.[15] It appears the Commission had these long-standing rules in mind when it initially clarified that access charges were due on IP-in-the-middle traffic "regardless of whether only one interexchange carrier uses IP transport or multiple service providers are involved"[16].

Finally, even if USA Datanet were correct (and it is not) that Frontier's tariff language did not specifically cover the circumstances described in the Frontier Petition, there is no legal or equitable foundation for USA Datanet to escape payment for the services it used. Pursuant to Section 69.5, the Commission has assessed access charges "upon all interexchange carriers that use local exchange switching facilities", regardless of whether those facilities were tariffed or not.

Similarly, while PAETEC appears to argue correctly that USA Datanet is liable, in the first instance, for the access charges, [17] this may not fully resolve the issue in every case. For example, a LEC might be liable for unreasonable conduct under section 201 to compensate another LEC if it were fully aware that the local services it was providing to an IXC such as USA Datanet were being used in an improper effort to avoid lawful access charges. In any case, it is clear that existing rules and precedent favor an outcome whereby Frontier is compensated for the originating access services it provided.

CONCLUSION

As shown by the parties' comments, the Commission must act quickly to preserve the legal foundation for commercial exchange and industry respect for Commission rules and orders.

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[15] AT&T Comments, at 8-10.

[16] *See AT&T IP-in-the-Middle Order* ¶ 1

[17] PAETEC Comments, at 1.

USA Datanet is using jointly-provided originating access services, and it is subject to access charges. Nonetheless, USA Datanet has failed to pay its interstate access charges bills for nearly three years, even while it has obeyed an order by the New York Public Service Commission to pay intrastate access charges. Instead, USA Datanet and its supporters continue with their delaying tactics in this proceeding by raising frivolous procedural objections. Accordingly, the Commission should promptly reject those objections and grant Frontier's Petition.

Respectfully submitted,

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